

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for arbitration of interconnection agreement with Sprint Communications Company Limited Partnership and Sprint-Florida, Incorporated.

DOCKET NO. 031047-TP
ORDER NO. PSC-04-0563-PCO-TP
ISSUED: June 1, 2004

ORDER ESTABLISHING PROCEDURE

I. Case Background

On November 12, 2003, KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (KMC) filed a Petition for Arbitration of Interconnection Agreement with Sprint Communications Company Limited Partnership and Sprint-Florida, Incorporated (Sprint). On November 18, 2003, Sprint filed its Response to Petition for Arbitration. The matter will, by way of this procedural order, be set for hearing.

II. Index

Topic	Page
Governing Provisions	2
Issue Identification / Tentative Issues	2
Filing Procedures	2
Prefiled Testimony, Exhibits, & Exhibit Identification	3
Discovery Procedures	4
Motions	6
Settlements & Stipulations	6
Telephonic/Electronic Proceedings	6
Prehearing Procedures	7
Hearing Procedures	9
Post-Hearing Procedures	11
Controlling Dates	12

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III. Governing Provisions

Formal hearing proceedings before the Florida Public Service Commission are governed by Chapter 120, Florida Statutes, and Chapters 25-22, 25-40, and 28-106, Florida Administrative Code. To the extent provided by Section 120.569(2)(g), Florida Statutes, the Florida Evidence Code (Chapter 90, Florida Statutes) shall apply. To the extent provided by Section 120.569(2)(f), Florida Statutes, and unless otherwise modified by the Prehearing Officer, the Florida Rules of Civil Procedure shall apply.

Rule 28-106.211, Florida Administrative Code, specifically provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. This Order is issued pursuant to that authority. The scope of this proceeding shall be based upon the issues raised by the parties up to and during the prehearing conference, unless modified by the Commission.

IV. Issue Identification / Tentative Issues

A list of the issues identified thus far in this proceeding is attached to this order as Appendix A. Prefiled testimony, exhibits, and prehearing statements shall address the issues set forth in the appendix.

V. Filing Procedures

A. General

In accordance with Rule 25-22.028, Florida Administrative Code, parties shall submit the original document and the appropriate number of copies to the Division of the Commission Clerk and Administrative Services for filing in the Commission's docket file. Filing may be made by mail, hand delivery, or courier service. Please refer to the rule for the requirements of filing on diskette for certain utilities. Filings pertaining to this docket should identify the assigned docket number and should be addressed to:

Director, Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

B. Document Identification

Unless modified by the Prehearing Officer for good cause shown, each page of every document produced pursuant to requests for production of documents shall be identified

individually through the use of a Bates Stamp or other equivalent method of sequential identification. Parties should number their produced documents in an unbroken sequence through the final hearing. An example of the typical sequential identification format is as follows:

[company initials] 000001

C. Public Access to Records

All files at the Commission shall be open to public inspection, unless otherwise prohibited by law, regulation or court order, or when upon motion and order the Commission or Prehearing Officer otherwise has the authority or discretion to prohibit public inspection. All hearings shall be open to the public unless prohibited by law, regulation, or court order or unless closed by order of the Commission or the Prehearing Officer for good reason.

The Division of the Commission Clerk and Administrative Services shall make available for public inspection upon reasonable request during the regular business hours of the Commission all of the public records of the Commission, as defined by Chapter 119, Florida Statutes, subject to any privilege or confidential treatment of those records. The Commission Clerk may charge a fee to recover reasonable costs of copying as specified by Section 119.07(1)(a), Florida Statutes.

D. Ex Parte Communications Prohibition

Pursuant to Section 350.042, Florida Statutes, a party or counsel for a party shall not initiate any oral or written communication with a Commissioner pertaining to a matter before the Commission unless prior consent of all other parties or their counsel has been obtained. Copies of all pleadings or correspondence filed with the Commission by any party shall be served upon all other parties or their counsel.

All parties are cautioned to follow the requirements of Rule 25-22.033, Florida Administrative Code, relating to disclosure of meetings between parties, their representatives, and Commission staff.

VI. Prefiled Testimony, Exhibits, & Exhibit Identification

Each party shall prefile, in writing, all testimony and exhibits that it intends to sponsor. An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of the Commission Clerk and Administrative Services, by 5:00 p.m. on the date due. A copy of all prefiled testimony and exhibits shall be served by regular mail, overnight mail, or hand delivery to all other parties and staff no later than the date filed with the Commission.

Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double-spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

When a witness supports his or her prefiled testimony with one or more exhibits, each exhibit submitted shall:

- (1) have been previously produced except for good cause shown;
- (2) be identified individually through some method of sequential identification (See (4)(c) below), with the pages numbered sequentially within each attached exhibit;
- (3) be attached to that witness' testimony when filed; and
- (4) have the following in the upper right-hand corner of each page:
 - (a) the docket number;
 - (b) the witness' name;
 - (c) the word "Exhibit" followed by a blank line for the exhibit number;
 - (d) the word "Page" followed by a blank line for the page number and the word "of" followed by a blank line for the total number of pages in the exhibit; and
 - (e) the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____, Page ____ of ____
Cost Studies for Minutes of Use by Time of Day

All known exhibits shall be marked for identification at the prehearing conference. If a demonstrative exhibit or other demonstrative tools are to be used at hearing, they must also be identified by the time of the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially.

VII. Discovery Procedures

A. General

Discovery shall be conducted in accordance with the provisions of Chapters 120 and 364, Florida Statutes, Rules 25-22, 25-40, and 28-106, Florida Administrative Code, and the Florida

Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.

When discovery requests are served and the respondent intends to object to, or to request clarification of, the discovery request, such objection or request for clarification shall be made within ten calendar days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

The hearing in this docket is set for September 8-9, 2004. Unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Discovery shall be completed by August 30, 2004.
- (2) Discovery requests shall be served by e-mail, fax, hand delivery, or overnight mail.
- (3) All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification.
- (4) Discovery requests shall be numbered sequentially within a set.
- (5) Subsequent discovery requests shall continue the sequential numbering system.
- (6) Discovery responses shall be served within 20 calendar days (inclusive of mailing) of receipt of the discovery request and shall be followed by hard copy within 2 calendar days if served electronically.
- (7) For good cause shown, additional time for mailing shall be afforded at the Prehearing Officer's discretion.
- (8) Discovery requests and responses shall also be served on staff.

Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Interrogatories, including all subparts, shall be limited to 250.
- (2) Requests for production of documents, including all subparts, shall be limited to 150.
- (3) Requests for admissions, including all subparts, shall be limited to 75.

B. Confidential Information Provided Pursuant to Discovery

Confidential information, and requests that information be deemed confidential, shall be governed by Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. In response to discovery requests, parties may need to provide information that another party in this proceeding deems, or may deem, confidential. When the submitting party is aware that such information may be deemed confidential, the submitting party shall notify the other

party prior to submitting the information, which shall be submitted with an accompanying Notice of Intent to Request Confidential Classification. This procedure is to ensure conformance with this Commission's rules regarding the handling and continued confidential treatment of such information pending a formal ruling by the Commission.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending: (i) a formal ruling on such request by the Commission; or (ii) return of the information to the person providing the information. Information that has not been made a part of the evidentiary record in the proceeding, shall be returned to the party providing it within: (i) one week of the hearing where no determination of confidentiality has been made; or (ii) the time period set forth in Section 364.183, Florida Statutes, where a determination of confidentiality has been made.

B. Depositions

Parties may conduct discovery by means of deposition. While parties may have a designated corporate representative present at a deposition, each party shall ensure that individuals other than its attorney and a corporate representative shall not be present at the depositions of any other witnesses in this docket. This prohibition shall apply to depositions conducted in person, by telephone, or by any other applicable means.

VII. Motions

Motions shall be determined pursuant to Chapters 120 and 364, Florida Statutes, Chapters 25-22, 25-40, and 28-106, Florida Administrative Code, and the Florida Rules of Civil Procedure (as applicable), as modified herein. The Prehearing Officer retains authority to adjust any time frames regarding motions for good cause shown.

IX. Settlements & Stipulations

The Commission shall be notified promptly of all settlements, stipulations, agency orders, or any other action terminating a matter before the Commission. A copy of such settlement, stipulation, agency order, or any other document reflecting an action terminating a matter before the Commission shall be filed with the Commission.

X. Telephonic/Electronic Proceedings

Where technically feasible, when all parties are in agreement, and subject to the explicit approval of the Presiding Officer, or as appropriate, the Prehearing Officer, parties may appear at

administrative Commission hearings or prehearings via the use of telephonic, video, or other electronic means in lieu of appearing in person.

XI. Prehearing Procedures

A. Prehearing Statements

All parties in this docket and staff shall file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of the Commission Clerk and Administrative Services by 5:00 p.m. on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission.

Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position.

Prehearing statements shall set forth the following information in the sequence listed below:

- (1) The name of all known witnesses that may be called by the party and the subject matter of their testimony.
- (2) A description of all known exhibits that may be used by the party (including individual components of a composite exhibit) and the witness sponsoring each.
- (3) A statement of the party's basic position in the proceeding.
- (4) A statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue.
- (5) A statement of each question of law the party considers at issue and the party's position on each such issue.
- (6) A statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue.
- (7) A statement of issues to which the parties have stipulated.
- (8) A statement of all pending motions or other matters the party seeks action upon.
- (9) A statement identifying the party's pending requests or claims for confidentiality.
- (10) A statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

- (11) Any objections to a witness' qualifications as an expert. Failure to identify such objection may result in restriction of a party's ability to conduct voir dire.

B. Attendance at Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held August 16, 2004, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Unless excused by the Prehearing Officer for good cause shown, or in accordance with the Prehearing Officer's approval of appearance by electronic means under Section X, each party (or designated representative) shall personally appear at the prehearing conference. Failure of a party (or that party's representative) to appear shall constitute waiver of that party's issues and positions, and that party may be dismissed from the proceeding.

C. Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate each of the following:

- (1) The party was unable to identify the issue because of the complexity of the matter.
- (2) Discovery or other prehearing procedures were not adequate to fully develop the issue.
- (3) Due diligence was exercised to obtain facts touching on the issue.
- (4) Information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue.
- (5) Introduction of the issue would not be to the prejudice or surprise of any party.

Specific reference shall be made to the information received and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

D. Expectations of Parties at Prehearing Conference

A draft prehearing order shall be circulated to the parties by the Commission's legal staff prior to the prehearing conference. To maximize the efficiency at the prehearing conference for the Commission and the parties, parties shall be prepared to:

- (1) define and limit, if possible, the number of issues;
- (2) determine the parties' positions on the issues;
- (3) determine what facts, if any, may be stipulated;
- (4) dispose of any motions or other matters that may be pending; and
- (5) consider any other matters that may aid in the disposition of this case.

XII. Hearing Procedures

A. General

As provided by Sections 120.569 and 120.57, Florida Statutes, formal hearings will be held before the full Commission or assigned panel of Commissioners. The Commission will give notice of a hearing in a manner consistent with Chapters 120, 350, and 364, Florida Statutes. All hearings shall be transcribed, and the transcripts shall become part of the record. All witnesses shall present testimony that is sworn or affirmed and shall be subject to cross-examination. Unless authorized by the Presiding Officer for good cause shown, parties shall not conduct discovery during cross-examination at the hearing.

B. Attendance at Hearing

Unless excused by the Presiding Officer for good cause shown, or in accordance with the approval of appearance by electronic means under Section X, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date of the following:

- (1) All parties agree that the witness will not be needed for cross examination.
- (2) All Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness' testimony.

C. Evidence

As provided by Sections 120.569 and 120.57, Florida Statutes, the Commission may consider the Florida Evidence Code (Chapter 90, Florida Statutes) as a guide, but may rely upon any evidence of a type commonly relied upon by a reasonably prudent person in the conduct of their affairs.

D. Use of Confidential Information at Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183(2), Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 36, Florida Statutes, at the hearing shall adhere to the following:

- (1) Any party intending to use confidential documents for which no prior ruling has been made must be prepared to present their justifications to the Commission for a ruling at the hearing.
- (2) Any party wishing to use proprietary confidential business information shall notify the Prehearing Officer and all parties of record by the time of the prehearing conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. Such notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence that is proprietary confidential business information.
- (3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files.

XIII. Post-Hearing Procedures

A. Bench Decision

The Commission (or assigned panel of Commissioners) may render a bench decision at the time of the hearing or render a decision without any post hearing submissions by the parties as deemed appropriate. Such a determination may be with or without the oral or written recommendation of the Commission staff, at the Commission's (or assigned panel's) discretion.

B. Statements of Issues & Positions and Briefs

If the Commission (or assigned panel) does not make a bench decision at the hearing, it may allow each party to file a post-hearing statement of issues and positions. In such event, a summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 50 words. If a post-hearing statement is required and a party fails to file in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time, unless modified by the Presiding Officer.

XVI. Controlling Dates

The following dates have been established to govern the key activities of this case:

- | | |
|---|---------------------|
| (1) Direct testimony and exhibits (all) | June 11, 2004 |
| (2) Rebuttal testimony and exhibits (all) | July 9, 2004 |
| (3) Prehearing Statements | July 30, 2004 |
| (4) Prehearing Conference | August 16, 2004 |
| (5) Discovery Cutoff | August 30, 2004 |
| (6) Hearing | September 8-9, 2004 |
| (7) Briefs | October 22, 2004 |

In addition, all parties should be on notice that the Prehearing Officer may exercise his discretion to schedule additional prehearing conferences or meetings of the parties as deemed appropriate. Such meetings will be properly noticed to afford the parties an opportunity to attend.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 1st day of June, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

LF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Appendix A

Tentative Issues List

1. Should the provisions of the interconnection agreement regarding security deposits apply to both parties?
2. How should the parties identify, exchange and compensate traffic transported in whole or in part over internet protocol?
3. (a) What, if any, is the appropriate loop acceptance process for a new install?
(b) When should billing for a newly installed loop begin?
4. What is Sprint's obligation to provide access to third parties, grooming functionality and redundant facilities with dedicated transport?
5. Is Sprint required to provide KMC access to Sprint's digital cross-connect systems ("DCS") as a stand alone UNE? If so, what system functionalities should Sprint provide to its DCS?
6. (a) Does commingling include connecting UNEs purchased from Sprint with wholesale services purchased from a third party?
(b) Should the parties' interconnection agreement state that Sprint will provide UNEs pursuant to applicable law?
7. Should Sprint be permitted to audit KMC's UNE-P customer base to verify compliance with the 4-line limitation where applicable?
8. What restrictions, if any, may Sprint impose on a conversion from a wholesale service to a UNE service?
9. Under what conditions, if any, may KMC commingle EELs purchased from Sprint with wholesale services purchased from a third party?
10. What are the eligibility criteria that apply to EEL access?
11. What are the conditions under which Sprint may conduct an audit of KMC's EELs?
12. What are the appropriate monthly recurring charges, if any, for line splitting?

APPENDIX A

13. What are the appropriate rates, terms and conditions for the performance of routine network modifications by Sprint:
 - (a) for loops?
 - (b) for dedicated transport?
14. Under what conditions, if any, may Sprint establish its own transport facilities for the delivery of Sprint-originated traffic?
15. What are the requirements for interconnection and compensation for the transport of Sprint end user originated ISP-bound traffic between Sprint's originating local calling area and a Point of Interconnection ("POI") outside Sprint's local calling area?
16. What are the appropriate billing and billing dispute resolution processes?
17. What measures, standards and remedies, if any, should apply to Sprint's performance?
18. Under what conditions, if any, should Sprint be required to provide shared cageless collocation space?
19. When will cross-connect charges apply?
20. When should billing for circuit facility assignments/terminations and related cable begin?
21. What rates, terms and conditions, if any, should apply to Sprint's provisioning of:
 - (a) cross-connects within KMC's collocation space, and
 - (b) What limitations, if any, apply to KMC's ability to cross-connect with other collocated carriers?
22. Under what conditions, if any, should KMC be allowed to use its own technicians to deploy:
 - (a) direct connects?
 - (b) co-carrier cross-connects?

APPENDIX A

23. Under what conditions, if any, may KMC utilize spare capacity on an existing interconnector's entrance facility for the purpose of providing an entrance facility to its collocation arrangement?